Federal Court  Cour fédérale

Date: 20160430

Docket: IMM-1760-16

Citation: 2016 FC 496

Ottawa, Ontario, April 30, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

BABUBHAI VENIDA PATEL

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] Babubhai Venida Patel, the Applicant, seeks a stay of the removal order he received on April 15, 2016. The said removal is scheduled for Monday, May 2. The stay Application is in support of an Application for an Authorization and Judicial Review, in the nature of a writ of mandamus, directed at the lack of a decision of the Minister of Public Safety and Emergency Preparedness concerning a long outstanding request of the Applicant for the Minister to declare that he is not inadmissible in this country, what is referred to as a Ministerial Relief.

[2] Following his conviction in relation to his attempt to smuggle into the United States a person the Applicant claims was a distant relative, for which he entered a guilty plea (April 2003), a conditional sentence of nine months, together with probation for 2 years was imposed. His sentence was completed.

[3] Having landed, as an immigrant from India, in 1998, he was declared inadmissible in Canada in view of his conviction following a report under the then sections 36 and 37 of the *Immigration and Refugee Protection Act* for serious criminality and organized crime. The Applicant's arrest and conviction were in relation with what has been described as a "large-scale organized smuggling operation of South Asian immigrants from India and Pakistan." (CBSA report on Application for Relief under ss. 37(2) *IRPA*). On the other hand, the conviction concerns only the assistance given by the Applicant with respect to one individual, a distant relative. The sentence imposed is a good indication of the seriousness of the offence in that instant case.

[4] Evidently, the Applicant has sought Ministerial Relief. For reasons that remain mysterious, the case of Mr. Patel, which appears simple on its face, has never been disposed of by the responsible Minister. It appears from the record before this Court that an initial positive recommendation has remained unanswered for close to 10 years (process started in October 2003).

[5] There may have been a change of heart in the bureaucracy after the Federal Court of Appeal decision in *Agraira v. MPSEP* 2011 FCA 103 as the record shows a draft recommendation with a negative recommendation.

[6] Following the Supreme Court of Canada decision in *Agraira*, 2013 SCC 36, [2013] 2 S.C.R 599, counsel for Mr Patel requested again that the matter be addressed. Counsel sought to benefit from the interpretation given by the Court to the provisions in *IRPA*. There appears to have been an Application for Ministerial Relief under paragraph 37 (2)(a) of *IRPA* submitted on March 7, 2013. There had been in the meantime requests for the matter to be dealt with, without success.

[7] As indicated earlier, Mr Patel was advised officially on April 15, 2016 that he had to leave Canada on May 2. Having anticipated the order, he sought an administrative deferral on April 10. The Applicant received the decision of the removal officer on April 28. There was no explanation given for the refusal.

[8] Stay applications are governed by the well known tripartite test of *RJR MacDonald Inc. v. Canada*, [1994] 1 SCR 311:

(a) Is there a serious issue to be debated in the underlying Judicial Review Application?

(b) Will the applicant suffer irreparable harm?

(c) Where does the balance of convenience lie?

[9] The Respondent complained that the stay application came very late in view of the official notice given on April 15 to the Applicant that his departure was expected on May 2. Unfortunately, this time it is the government that is largely the author of its own misfortune. It chose to respond to the deferral request 18 days after it was made with a 3 line letter. At any rate, the Respondent produced written representations, which is to the credit of counsel for the government, that were supplemented with a capable oral argument.

[10] Mr Patel is 59 years old. He has been living in this country with his family for close to 20 years. He has created his own employment. The only blemish on his record seems to be his conviction for which he has been declared inadmissible by the operation of the law. He has sought Ministerial Relief which has been pending for the better part of 10 years.

[11] In spite of an application for Ministerial Relief about which there has been a positive recommendation, the government wants Mr Patel removed on short notice because, among other things, the travel documents expire on May 22.

[12] The government has not challenged one of the 3 prongs of the tripartite test. We focus on irreparable harm and the balance of convenience.

[13] In my view, the real focus must be on irreparable harm. It is clear that the public interest favours the removal of persons without status. However, the other side of the scale is occupied in this case with factors that heavily favour the Applicant. He has children and a grandchild, who are Canadian citizens; he supports and has been supported by a wife; there in only what

appears to be a relatively minor blemish on a very positive record since he joined the Canadian society some 18 years ago; he has been seeking Ministerial Relief for 13 years without a response. The balance favours the Applicant.

[14] Irreparable harm, as it is understood in the immigration context, would rarely be suffered if the Applicant were to be removed before a Judicial Review application has been the subject of a disposition.

[15] I am certainly conscious that mere inconvenience does not constitute irreparable harm. It has been said that assessing irreparable harm in very much fact specific (*Selliah v. Canada (MCI),* 2004 FCA 261).

[16] The court has to conclude that, in the unusual circumstances of this case, irreparable harm, which is harm that cannot be cured and where the evidence is credible and the harm non-speculative, has been established on a balance of probabilities.

[17] Because of a lack of diligence in deciding whether or not to grant Ministerial Relief in a relatively straight forward case, Mr Patel has been in limbo for many years. He has now reached the age of 60, is solidly established with his family in this country and has contributed to his community through the creation of businesses. He would have to be separated from his family and the businesses he has created in this country. It is probably late in life to start afresh in a country left 20 years ago. We are talking here more than disruption of personal relationships: it is the life built in this country through many sacrifices that is destroyed because a decision on

something rather simple, the granting of Ministerial Relief in the circumstances as uncontroversial as those in this case, has not been made.

[18] There is of course no guarantee that Ministerial Relief will be granted. However, the circumstances at this stage are such that it is appropriate to grant the remedy sough and to stay the removal of the Applicant until his Application for Authorization and Judicial Review (with nature of a mandamus writ) had been dealt with.

ORDER

THIS COURT ORDERS that the Application for a stay of the removal order set for May 2, 2016, is granted.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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